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Supreme Court of the United States.

OCTOBER TERM, 1975.

PAUL CELLA AND BARBARA CELLA,
PETITIONERS,

v.

PARTENREEDEREI MS RAVENNA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Supreme Court of the United States.

OCTOBER TERM, 1975.

PAUL CELLA AND BARBARA CELLA,
PETITIONERS,

v.

PARTENREEDEREI MS RAVENNA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners Paul A. Cella and Barbara Cella respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the First Circuit to review the judgment of that court entered on December 29, 1975, in the above-entitled action. Judgment was entered on December 29, 1975, pursuant to an opinion affirming the decision of the trial court. A copy of said judgment is appended hereto as Appendix B. The said judgment has been docketed on the official record of the United States Court of Appeals for the First Circuit, and a copy of said docket is appended hereto as Appendix C.

Opinion Below.

The opinion of December 29, 1975, of the United States Court of Appeals for the First Circuit does not yet appear in the official reporter. It is contained in the official record of said court, and a copy of said opinion is appended hereto as Appendix A.

A copy of the order and memorandum dated May 6, 1975 by the United States District Court for the District of Massachusetts denying the plaintiffs' motion for an order of the court assessing attorney's fees and for distribution of a fund deposited in the court is appended hereto as Appendix D.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit now sought to be reviewed was entered on December 29, 1975. Entry was made pursuant to an order dated that same day. Therefore, this petition falls within the time prescriptions of 28 U.S.C. § 2101.

Jurisdiction to review the aforesaid proceedings exists by virtue of 28 U.S.C. § 1254.

Question Presented.

Whether an attorney's fee may be awarded, pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.*, as amended in 1972, from a common fund created through the efforts of longshoreman's attorney in pursuing a third party action.

Statutes Involved.

The case involves § 905 and § 933 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.

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§§ 901 *et seq.* The provisions of § 905 and § 933 are appended hereto as Appendix E.

Statement of Facts.

The present controversy derives from litigation which arose out of a maritime personal injury sustained by the petitioner Paul A. Cella, on December 12, 1972, while he was employed as a longshoreman by the stevedoring firm of John T. Clark and Son of Boston. The accident occurred while the plaintiff was working aboard the MS Star Ravenna, a vessel owned by the defendant in the case.

The petitioners filed a personal injury suit in United States District Court for the District of Massachusetts. Prior to trial, the case was settled in the amount of $199,560.72, paid to the plaintiff by the shipowner's insurer on September 30, 1974.

The American Mutual Insurance Company was the compensation insurer of the petitioner Paul A. Cella's employer, John T. Clark and Son. Under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901 *et seq.*, American Mutual paid the petitioner Paul A. Cella a total of $24,560.72 before settlement of the action was effected.

Acknowledging an obligation to repay the lien of the compensation insurer, counsel for the petitioners deducted $24,560.72 from the gross settlement, leaving $175,000. From the latter amount, he then deducted his fee based upon a one-third contingent fee agreement, and turned over the remainder to the petitioners.

Counsel for the petitioners notified American Mutual Insurance at the time of the aforementioned settlement,

that he asserted a right to be reimbursed for the fair value of his services rendered in creating and setting aside the compensation lien for the benefit of the insurer after successful negotiation of a settlement with the ship.

Pursuant to an agreement of counsel, a bond in the amount of $10,000—which sum was determined to represent a reasonably contestable portion of the total compensation paid to the petitioner Paul A. Cella was deposited with the Registry of the District Court, and the remainder of $14,560.72 paid to the compensation insurer.

American Mutual at no time retained the petitioners' counsel to protect its interests in the litigation, and did not intervene in the action. American Mutual merely sent the petitioners' counsel a letter asserting a lien on any judgment or settlement effected against the shipowner to the extent of the compensation benefits paid to the petitioners.

Jurisdiction over the cause of action in the District Court was predicated upon 28 U.S.C. § 1332.

History of Proceedings.

Subsequent to the filing of the bond, motions for and in opposition to the assessment of attorney's fees from the fund were filed along with memoranda in support thereof. On May 5, 1975, an order was entered by the District Court denying the plaintiffs' counsel's motion and ordering the bond be paid to the insurance company.

The aforesaid order was appealed to the United States Court of Appeals for the First Circuit pursuant to 28 U.S.C. § 1291 (1970). On December 29, 1975, said Court of Appeals issued an opinion which affirmed the decision of the District Court.

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Considerations Governing Review on Certiorari.

The decision of the Court of Appeals for the First Circuit sought to be reviewed falls within the scope of Rule 19 of the Rules of the Supreme Court of the United States.

In particular, the aforesaid decision conflicts with the decision of the Court of Appeals for the Fourth Circuit on the same issue.

Swift v. *Bolten*, 517 F. 2d 368 (4th Cir. 1975).

These contrary decisions destroy the fundamental concept of uniformity in the General Maritime Law. The aforementioned decisions represent the only interpretations by Circuit Courts of Appeal of the aforesaid federal statute as it relates to the issue here presented since the Act was amended in 1972.

The Act itself makes no provision for reimbursement of the employer or its insurance carrier for compensation benefits paid and does not set out any formula for the distribution of the proceeds of any recovery by the longshoreman-employee against the third party tortfeasor.

A definitive ruling on the interrelationship of equitable principles and statutory interpretation is clearly required.

For the aforesaid reasons, certiorari should be granted.

Argument.

A. The Fund Created and Preserved by the Petitioners' Attorney may be Assessed Reasonable Attorney's Fees under the "Common Fund" Doctrine.

The principle long exercised by the courts of England and the United States that a fund which has been created, increased, protected or preserved by an attorney's services should provide compensation for his efforts springs from powers originally exercised in equity. One who

creates and preserves such a fund works for others as well as himself and these others, to whom the fruits of his efforts inure ought, in equity and good conscience to contribute their due and just proportions of the time and expense fairly incurred by the creation and preservation of such funds. The most equitable manner of securing such a contribution is to make the fair value of those services rendered a charge upon the fund. *Trustees* v. *Greenough*, 105 U.S. 527; 26 L. Ed. 1157 (1881). The *Greenough* doctrine is not founded upon the theory that the allowance is for attorney's fees as such, or as an element of court costs, but rather, "is part of the original authority of the chancellor to do equity in a particular situation." *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 166; 59 S. Ct. 777; 83 L. Ed. 1184 (1939). "[F]ederal courts do not hesitate to exercise this inherent equitable power whenever overriding considerations indicate the need of such a recovery." *Hall* v. *Cole*, 412 U.S. 1, 6; 93 S. Ct. 1943; 36 L. Ed. 2d 702 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391-392; 90 S. Ct. 616; 24 L. Ed. 2d 593 (1970).

Such an allowance may be made to one whose efforts produced a fund for others for whom he did not profess to act or sue as their representative. *Sprague*, *supra*, p. 167. The denial of such an assessment upon the fund,

> ". . . would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself . . . [t]hey ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution." *Greenough*, *supra*, p. 532.

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The lack of an express contract between the petitioner's attorney and the insurance carrier for services does not avail the respondent, for where, as in the instant case, their interests coincide and the carrier takes no action with respect to the preservation of its interests, save the submission of a letter claiming a lien on the proceeds in the event of a successful recovery, the petitioner's attorney's right to be compensated from the fund is unaffected. See, for example, Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds,* 87 Harv. L. Rev. 1597, 1607-1609 (1974).

> "The workings of the Greenough machinery are not quite inexorable, for the third party, the potential beneficiary, can probably escape it if he has hired and paid his own attorney to take part actively in the litigation. This can be considered an implied rejection of any service to him by the mover of the litigation or his attorney. But it is more than this. It means that the ride for him is not free and that he becomes a contributor to the final result, so that two essential bases of the *Greenough* doctrine are eliminated." *Dawson, supra,* p. 1647.

An attorney's claim for an allowance out of the fund for services rendered in its creation and preservation in this instance is quasi-contractual in nature:

> "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills, supra,* p. 392. See also, *Cherner* v. *Transitron Electronic Corporation,* 221 F. Supp. 55 (D. Mass. 1963), modified on other grounds, 326 F. 2d 492 (1st Cir. 1964).

In other words, the "free rider" situation is an appropriate one for the Court to exercise its equitable powers to award attorney's fees.

But the genesis of the right herein asserted is the necessity for the creation of the pecuniary advantage to the carrier in the first place. The significant question is whether the carrier actually benefits from the longshoreman's recovery, and whether he should reimburse the attorney but for whose services a sizable amount of money might not have been recovered. As Judge Wisdom put it:

> "The proof is in the pudding: the labors of the plaintiff's lawyer have put the employer in a better financial position than he was in before the litigation began. Of course, if the lawsuit results in no financial benefit to the employer, there is no pudding, and no need for reimbursement of the plaintiff's lawyer." *Chouest* v. *A & P Boat Rentals, Inc.*, 472 F. 2d 1026, 1032 (5th Cir. 1973).

A most recent expression of the vitality of the *Greenough* doctrine was enunciated by the Supreme Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240; 95 S. Ct. 1612; 44 L. Ed. 2d 141 (May 12, 1975), in which the Court reversed an award of attorney's fees based on the rapidly emerging "private attorney general" exception to the "American rule" against such awards to the successful plaintiff in the absence of statutory authorization. In examining the history, applications and impact of the "docket fee" statute (28 U.S.C. § 1923) and having ruled that the district courts were incorrect in awarding attorney's fees in the "private attorney general" situation absent statutory authority, the Court said (95 S. Ct. at page 1621):

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> "To be sure, the fee statutes have been construed to allow, in limited circumstances, a reasonable attorney's fee to the prevailing party in excess of the small sums permitted by § 1923. In *Trustees* v. *Greenough,* 105 U.S. 527 (1881), the 1853 Act was read as not interfering with the historic power of equity to permit the Trustee of a fund or property, *or a party preserving or recovering a fund for the benefit of others in addition to himself,* to recover his costs, including attorney's fees, from the fund or property itself or directly from the other parties enjoying the benefit. That rule has been consistently followed." (Citing cases.) (Emphasis supplied.)

Thus it is clear that a District Court is empowered in its discretion to award the successful plaintiff's attorney a fee from a fund created for the benefit of an ascertainable class in the absence of specific statutory authorization.

B. A Fund Created and Preserved for the Benefit of the Insurance Carrier Solely Through the Efforts of the Employee's Counsel in Pursuing a Third Party Action under the L.S.H.W. C.A., as Amended, Is Subject to an Attorney's Fee.

Effective November 26, 1972, Congress enacted certain amendments to the Act which have worked such a drastic realignment of the interests and remedies of the participants so as to make an equitable reapportionment of the fund now compelling.

By virtue of the new § 905(b), an injured longshoreman is limited to an action sounding in negligence against a vessel. The vessel, in turn, is precluded from implead-

ing or otherwise shuttling its liability for the longshoreman's damages over to the stevedore-employer under any theory including indemnity, contribution, set off or credit.

Thus, the severance of the stevedore-employer's circular liability for the injuries caused by a third party vessel, which had become the common occurrence in litigation after *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.,* 350 U.S. 124; 76 S. Ct. 232; 100 L. Ed. 133 (1956), now results in a new identity of interest as between the stevedore and its employee.

Formerly, under the circular liability pattern established by *Ryan, supra,* and as a consequence, the adversary position in which the stevedore-employer stood vis a vis his covered employee, where the longshoreman filed his action against the vessel owner, the stevedore (and ultimately the carrier) stood to, and in most cases, did, wind up paying damages far in excess of its statutory obligation. For example, as Judge Brown observed dissenting in *Strachan Shipping Company* v. *Melvin,* 327 F. 2d 83, 90 (5th Cir. 1964):

> "In this sometime weird *Ryan-Yaka* world, there is only one thing certain: no stevedore in his right mind wants, or encourages, a suit by an injured employee against a third party vessel or vessel owner."

And so, later on, in a case under the Act examining the right of the longshoreman's attorney to a fee for the creation of a fund to reimburse the carrier for compensation benefits paid, the Court, while recognizing the vitality of the "common fund" doctrine (citing *Sprague, supra*), noted that the ultimate exposure of the employer to pay the judgment rendered in the creation of such a fund through litigation by the employee against the shipowner:

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> ". . . held no promise of benefit to them, but certain expense and the risk of much greater loss." *Ballwanz* v. *Jarka Corporation of Baltimore,* 382 F. 2d 433 (4th Cir. 1967) at p. 436.

It was under these adversary conditions, from which the employer would most often suffer a great financial detriment rather than a benefit, that the cases contemplating an asserted attorney's fee upon the fund (the employer's right to which was regarded as arising out of an equitable interest—see, *The Etna,* 138 F. 2d 37 (3d Cir. 1943)) consistently denied such assessment.

Thus, it was with a view toward the positions of the parties in the circular liability situation existing under the Act prior to the 1972 amendments which led Judge Haynsworth to state in *Ballwanz*:

> "It is well settled, of course, that lawyers who successfully create or preserve a fund in the custody of the court for the benefit of a class, are entitled to reasonable compensation out of the fund. This is true though some members of the class, claimants to the fund, may have opposed its creation or preservation. That principle does not extend to the recovery of legal fees from one, not a member of a mutually benefited class, who derives an incidental benefit from litigation. Most assuredly, it does not extend to the imposition of legal fees upon an adverse party out of whose resources the alleged fund has been created." 382 F. 2d at 435.

As a result of the 1972 amendments, which still are silent as to any employer's lien or right to reimbursement for benefits paid, the conflict of interest which was at the heart of the pre-amendment decisions denying assessment of fees, no longer exists. The employer stands

to reap a substantial pecuniary advantage from the employee's suit.

The employer now sides with the employee in spirit, and relying on his attorney, hopes that his action against the vessel will be consummated favorably, so that the employer need only write a letter asserting a right of reimbursement to recoup a sum which, but for the efforts of the employee's counsel, it might not be able to regain without intervention or expense on its part.

C. The Court of Appeals for the First Circuit Misconstrued the Overriding Purpose of the 1972 Amendments in Not Granting an Attorney's Fee under the "Common Fund" Doctrine.

Throughout the course of its opinion, the Court of Appeals has traced pre-amendment cases denying assessment of attorney's fees from the fund (p. 19); the ever expanding legislative policy to increase and preserve the right of the longshoreman to bring his own action against a third party tortfeasor (n.3); the equitable, judicially established basis from which the employer's right to reimbursement of a fund created under the Act is derived (p. 22); the change in the interests and positions of the parties in litigation after the amended Act (p. 22) and, finally, the Fourth Circuit decision of *Swift* v. *Bolten*, 517 F. 2d 368 (4th Cir. 1975), with which analysis of the equitable considerations applying to the fund in cases arising after the amendments, it apparently agrees:

> "Were we to follow the fourth circuit and hold that the normal dictates of equity control allocation of attorney's fees in this case, we might be more disposed to find that it would be appropriate to award fees out of that portion of the settlement that goes to reimburse Cella's employer" (footnote omitted) (p. 24).

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The court goes on to say, however, that in the instant case (apparently in conflict with the same factual situation under the amended Act as in *Swift*), the allocation of attorney's fees from the fund "must conform to the purpose and policies of the Act."

Without attempting to elucidate how the equitable analysis of the proper allocation of the fund in *Swift* (as here, judicially created upon equitable principles) was divorced from the purposes and intent of the Act itself, the court seems to feel that the charging of the fund with reasonable attorney's fees conflicts with its conclusion that:

> ". . . the overriding purpose of the 1972 amendments was to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of the increased benefits under the Act" (p. 25).

The petitioners have no quarrel with the conclusion that the carrier's resources should be husbanded for that precise purpose.

It is submitted, however, that if the precedent of the First Circuit is allowed to stand it will achieve the opposite result by frustrating and chilling the longshoreman's right to sue the shipowner and thereby substantially reduce the amounts which the stevedore, and its carrier, could have recouped in fund reimbursements as well as discharges of future liability to covered employees by way of their settlements with defendant shipowners. § 933(g).

As earlier discussed, by virtue of the amendments, it is now to the employer's advantage that employees maintain third party actions. But since the sections of the Act requiring prompt payment of benefits (§ 914(a) and

(b)) have been left unaltered, it will not be in the employer's interest now, any more than before, to controvert the claims just to receive an assignment of the cause of action under § 933(b). Thus, as before the amendments, employees, as compared with employers, will bring the vast majority of the third party actions.

In such actions, if the employer intervenes and actively fights along side its employee for the purpose of protecting its lien, by helping to recover a favorable verdict or settlement, it would have to pay its own attorney's fees for this purpose. By the same token, attorney's fees should be paid from the fund returned if there's a successful result without such active intervention.

But with the increased benefits paid to covered employees after the amendments, an injured employee's attorney faces three formidable prospects in taking a case against a shipowner where the fund will be returned to the employer undiminished by his reasonable expenses in creating it: a) the fund returnable may in many cases be nearly as large as the prospective verdict or settlement; b) the expenses of proving a negligence action against the vessel (as opposed to one for unseaworthiness) will be greater; and c) the prospect of settling the action against the shipowner is diminished since the stevedore no longer (after the *Ryan* indemnity action was abolished) will have the incentive to waive all or part of its compensation lien to contribute to the settlement in order to avoid its circular liability as before.

The net effect of such a policy, should it be allowed to stand, will result in very few employee third party actions being brought against shipowners for injuries sustained wholly or partially through the shipowner's negligence.

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As a result, recoupment of funds by the employers (and discharges of future liability to employees from settlements) will be substantially reduced. The cost to the carriers of providing compensation benefits will remain unabated, and incentives for shipowners to provide safe working areas for longshoremen in American ports will be diminished considerably.

Can it be that Congress, by remaining silent on the subject of the reimbursement of compensation benefits generated through the efforts of employees in bringing third party actions under the amended Act, intended such untoward results?

Much more consonant, it is submitted, with the purposes and intent of the amended Act and much more in accord with the new equities and interests of the stevedore vis a vis his employer is a proper allocation of the fund between them.

To this end, then, the petitioners seek this Honorable Court's review and reversal of the opinion of the First Circuit Court of Appeals in this case.

Conclusion.

It is respectfully submitted that the United States Court of Appeals for the First Circuit has rendered a decision of significant consequence to the course of litigation under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972 as regards statutory interpretation and the application of equitable principles to the allocation and distribution of that portion of a

longshoreman's recovery under the Act to which the employer seeks reimbursement.

Wherefore, the petitioners pray that a writ of certiorari issue for review of opinion below.

Respectfully submitted,

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Appendix A.

United States Court of Appeals for the First Circuit.

No. 75-1210

PAUL A. CELLA and BARBARA CELLA,
PLAINTIFFS,
v.
PARTENREEDEREI MS RAVENNA,
DEFENDANT, APPELLEE,

MICHAEL B. LATTI,
APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(HON. ANDREW A. CAFFREY, *U.S. District Judge*)

Before COFFIN, *Chief Judge*,
MCENTEE, *Circuit Judge*, and THOMSEN*,
Senior District Judge.

Michael B. Latti with whom *Robert B. Fredericks* and *Kaplan, Latti and Flannery* were on brief, for appellants.
John A. Donovan, Jr., with whom *Thomas D. Burns* and *Burns & Levinson* were on brief, for appellee.

December 29, 1975

COFFIN, *Chief Judge*. This appeal arises from a claim of attorney's fees against that part of a longshoreman's recovery against a third party shipowner which is subject to a stevedore-employer's compensation lien. Appellant-attorney claims that his action in pursuing an injured longshoreman's

*Of the District of Maryland, sitting by designation.

third party complaint to settlement created a "common fund" which the longshoreman and the employer's compensation carrier shared. Equity, he says, demands that the compensation carrier be required to pay reasonable attorney's fees out of that portion of the recovery which it receives.[1] Relying on precedent, the district court denied the attorney's motion for fees, and ordered the entire amount to be paid to the insurance carrier without an allowance for fees. The issue on appeal is whether the district court applied the proper legal standards in refusing to grant the requested fees.

The injury to longshoreman Cella occurred on the MS RAVENNA on December 11, 1972, shortly after the effective date of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* Almost immediately thereafter, the compensation carrier of Cella's employer began paying medical benefits and compensation without reducing its liability to an award. 33 U.S.C. §§ 907, 914. The longshoreman instituted suit against the shipowner alleging that it had negligently caused his injury. The employer's insurance carrier did not formally intervene in the action, but notified both the longshoreman and the defendant shipowner that it was asserting a lien on the longshoreman's recovery in the amount of the compensation and

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[1] We understand the issue to be whether the reimbursement of the insurance carrier is to be reduced by a reasonable charge for attorney's fees. We do not understand the attorney to claim that his contingency fee should be calculated on the entire settlement amount, and the additional fee be paid from the sum that would otherwise go to the injured longshoreman. The latter allocation of the recovery – sums go first to attorney's fees, then full reimbursement of the employer and finally, the remainder to the injured employee – is that provided for employer suits under 33 U.S.C. § 933(e). *See Fontana* v. *Pennsylvania R.R.*, 106 F. Supp. 641 (S.D. N.Y. 1952), *aff'd mem. on opinion below sub. nom., Fontana* v. *Grace Lines, Inc.*, 205 F.2d 151 (2d Cir.), *cert. denied*, 346 U.S. 886 (1953).

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benefits paid.[2] The case never went to trial, but was settled for a total sum of $199,560.72. By the time of settlement, the carrier had paid $24,560.72 in compensation and medical benefits, and was liable for no more as the settlement was not consented to in writing. *See* 33 U.S.C. § 933(g). The issue in this case is the proper distribution of the settlement. After subtracting the total amount due the insurance carrier, the plaintiff's attorney retained one-third of the net settlement of $175,000 as a fee from the longshoreman, and turned the rest over to his client. Wishing to assert a right to fees from the insurance carrier, the attorney forwarded $14,560.72 to the carrier, and deposited the balance, $10,000, in the registry of the district court.

The issue of whether attorney's fees can be subtracted from the portion of a longshoreman's recovery against a third party tortfeasor which reimburses the employer's insurance carrier has a long history of litigation. With the exception of those cases where the recovery against the third party does not adequately compensate the longshoreman and his attorney, *Chouest* v. *A & P Boat Rentals, Inc.*, 472 F.2d 1026 (5th Cir.), *cert. denied*, 412 U.S. 949 (1973); *Strachan Shipping Co.* v. *Melvin*, 327 F.2d 83 (5th Cir. 1964), the employer or its carrier has not been required to bear a portion of the burden of attorney's fees or litigation expenses. *Lamar* v. *Admiral Shipping Corp.*, 476 F.2d 300, 303 (5th Cir. 1973); *Haynes* v. *Rederi A/S Aladdin*, 362 F.2d 345, 351 (5th Cir. 1966); *Davis* v. *United States Lines Co.*, 253

[2] The insurance carrier specifically informed the plaintiff's attorney that it was not engaging him to represent the company for the recovery of the compensation payments. Another firm did monitor the proceedings for the insurance carrier, but did not actively participate in the litigation. That there was no contractual relationship between the plaintiff's attorney and the insurance carrier does not affect the attorney's rights under the "common fund" theory of awarding fees. *See* Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 Harv. L. Rev. 1597, 1607-09 (1974).

F.2d 262 (3d Cir. 1958); *Fontana* v. *Pennsylvania R.R.*, 106 F. Supp. 461, 463-64 (S.D. N.Y. 1952), *aff'd. mem. on opinion below sub. nom., Fontana* v. *Grace Lines, Inc.*, 205 F.2d 151 (2d Cir.), *cert. denied*, 346 U.S. 886 (1953).

Appellant aknowledges this weight of precedent, but contends that these cases merely reflect the lack of equity in awarding attorney's fees from the stevedore employer prior to the 1972 amendments to the Act. He claims that the common fund theory has always been applicable to fees in the context of longshoremen's suits, and that the relevant equities have been changed so substantially by the 1972 amendments that an award of fees is now appropriate. Appellee contends that the refusal to assess fees, although not mandated by the Act, *see* 33 U.S.C. § 933, was to conform the distribution of the recovery to that provided for in the Act, *see* 33 U.S.C. § 933(e), and furthers the purposes of the Act.

The Act, as amended, permits an injured longshoreman both to receive compensation under the Act and sue a third party for the injuries he has received.[3] 33 U.S.C. § 933(a).

[3] Under the original, 1927 legislation, an injured longshoreman was required to elect between receiving compensation and suing a third party. If the longshoreman received compensation, his right of action against the third party was assigned to his employer. Act of March 4, 1927, ch. 509, § 33, 44 Stat. 1440. In 1938, the section was amended to allow the injured longshoreman both to receive compensation and file suit. If compensation was paid pursuant to an award by the Deputy Commissioner, however, the longshoreman's cause of action was assigned to his employer. Act of June 25, 1938, ch. 685, §§ 12, 13, 52 Stat. 1168. A subsequent amendment, in 1959, delays the assignment of the right of action to six months from the date of the award. Until that time the employee is free to sue. Act of August 18, 1959, P.L. 86-171, 73 Stat. 391. As the Act directs employers to compensate injured longshoremen without an award, 33 U.S.C. § 914(a), unless the employer's liability is controverted, most suits are brought by the longshoreman, entirely independent of the 1959 amendment to 33 U.S.C. §933(b). The 1972 amendments do not substantially change the provisions of this section.

BLEED THROUGH

The Act itself makes no provision for reimbursement of the employer or its insurance carrier, and does not set out a particular formula for distribution of any recovery against the third party tortfeasor. If, however, compensation is paid to the injured workman subject to an award, and the longshoreman does not sue the third party within six months of the date of the award, the right of action against the third party is assigned to the employer or his insurance carrier, who then is empowered to file suit. 33 U.S.C. §§ 933(b) & (h). If the employer or carrier recovers damages in a suit filed pursuant to § 933(b), the recovery must be allocated according to the formula contained in § 933(e). Under this scheme the employer retains not only the amount of all compensation previously paid and the present value of all amounts payable in the future under the award, but a reasonable attorney's fee and one fifth of any amount recovered in the suit in excess of the payments made, the present value of future payments, and its costs and attorney's fees.[4]

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[4] 33 U.S.C. § 933(e) reads:

"Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to –

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board;

(B) the cost of all benefits actually furnished by him to the employee under section 7 [§ 907 of this title];

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7 [§ 907 of this title], to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer."

Shortly after the amendment to the Act which allowed the injured longshoreman to sue a third party as well as receive compensation payments, the courts found that the employer had an equitable right to reimbursement for compensation paid upon the worker's recovery from the third party. *The Etna,* 138 F.2d 37 (3d Cir. 1943). Formal intervention in the third party action is not necessary to protect this right. *E.g., Russo* v. *Flota Mercante Granocolombiana,* 303 F. Supp. 1404, 1406 (S.D. N.Y. 1969).

When allocating the recovery obtained in an employee-plaintiff suit, some courts found that the attorney's fees should not be charged so as to reduce the reimbursement amount returned to the employer. Because they were not so charged when the employer sued under § 933(b), these courts reasoned that it should make no difference who brought the suit in distributing the recovered sums. *Davis* v. *United States Lines, Co., supra; Fontana* v. *Pennsylvania R.R., supra* at 464; *see Ashcraft & Gerel* v. *Liberty Mutual Ins. Co.,* 343 F.2d 333 (D.C. Cir. 1965). More fundamentally, the courts found that the liability of the employer should be strictly limited to providing a guaranteed level of compensation. Once the employee is assured of receiving from a third party an amount not less than the minimum amount of the compensation set by the Act, the employer's liability was considered to be terminated.[5] Full reimbursement of the employer, without any reduction for litigation expenses, was "an important object of Congressional policy." *Ashcraft & Gerel, supra* at 336; *accord, Davis* v. *United States Lines, Co.,* 153 F. Supp. 912, 915-17 (E.D. Pa. 1957), *aff'd,* 253 F.2d 262 (3d Cir. 1958).

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[5] By settling the suit against the shipowners, plaintiff terminated his employer's future liability under the Act without a formal determination that the recovery from the third party equalled or exceeded his rights under compensation. There is no contention that the settlement was, in fact, inadequate. We do not address the problems associated with an inadequate recovery.

BLEED THROUGH

The fourth circuit, however, has adopted a different analytical approach which, after the 1972 amendments, led it to an opposite result. Prior to the amendments it had held that the § 933(e) distribution scheme did not control the allocation of an employee-plaintiff suit recovery. Rather, it ruled that proration of attorney's fees would be inappropriate under established principles of equity. *Ballwanz* v. *Jarka Corp.*, 382 F.2d 433 (4th Cir. 1967).[6] At the time of *Ballwanz*, a third party suit by a longshoreman often resulted in the imposition of liability upon a stevedore employer in an amount greater than the recovery of the injured longshoreman. A longshoreman could recover against a shipowner for breach of the warranty of seaworthiness. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946). The shipowner, in turn, could hold the stevedore-employer liable for the damages and the costs of defense resulting from the longshoreman's suit on the theory of breach of the stevedore's warranty of workmanlike performance, or through a contractual indemnity clause. *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). The longshoreman's successful suit did not create a benefit for the employer; rather, it subjected the employer to a greater liability than that it owed for compensation under the Act.

In a recent case, *Swift* v. *Bolten*, 517 F.2d 368 (4th Cir. 1975), the fourth circuit found that the 1972 amendments, by overriding these judicial doctrines, altered the equities between the longshoreman and his employer so substantially, that the stevedore should be taxed an appropriate attorney's

[6] The *Ballwanz* court's primary and first thrust was upon its finding that the principles of equity did not sustain an award of fees. It found, "[n]one of the essential concurrent pillars of the principle are present." 382 F.2d at 436. It went on to state that the Act did not compel the award of attorney's fees. *Id.* A fair reading of *Ballwanz*, despite its discussion of the statutory factors, is that it was decided on the principles of equity. *Swift* v. *Bolten*, 517 F.2d 368, 370 (4th Cir. 1975).

fee. *Id* at 370. Under the amendments, the longshoreman must prove negligence to recover from the shipowner, thus making a third party action more difficult to win. More importantly, the shipowner is unable to pass on its liability to the stevedore. 33 U.S.C. § 905(b). Under recent decisions, the stevedore receives full reimbursement of its compensation payments even if it was concurrently negligent in causing the longshoreman's injuries, *Dodge* v. *Mitsui Shintaku Ginko K.K. Tokyo,* No. 75-1442 (9th Cir. Nov. 21, 1975), and cannot otherwise be compelled to contribute to the longshoreman's recovery. *Shellman* v. *United States Lines, Inc.,* No. 75-3071 (9th Cir. Nov. 21, 1975); *Landon* v. *Lief Hoegh & Co.,* 521 F.2d 756 (2d Cir. 1975). The stevedore-employer is no longer in the position of an adversary to an injured longshoreman in a third party suit. The employer benefits from a successful suit but risks no further liability because of it.

Were we to follow the fourth circuit and hold that the normal dictates of equity control the allocation of attorney's fees in this case, we might be more disposed to find that it would be appropriate to award fees out of that portion of the settlement that goes to reimburse Cella's employer.[7] But

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[7] Appellee claims that the common fund theory is technically inapplicable. Attorney's fees are charged under that theory, only if the stranger benefitting from the fund would have otherwise been able to sue and would have accrued expenses in doing so. The employer could have intervened in the longshoreman's suit and actively joined with its employee in pursuing the present action. An independent suit to recover compensation paid, *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.,* 394 U.S. 404 (1969), may no longer be available. 33 U.S.C. § 905(b) states, in part, "The remedy provided in this subsection [suit on the theory of negligence] shall be exclusive of all other remedies against the vessel except remedies available under the Act."

If, however, the stevedore had reduced its liability to the longshoreman to an award, and then sued under § 933(b), it would not have been liable for attorney's fees if an adequate recovery was made. Because of the disposition we make of the main issue, we do not reach this technical point.

BLEED THROUGH

this case arises in the context of the Longshoremen's and Harbor Workers' Compensation Act. While the statutory provisions do not govern the distribution of the recovery of an employee suit, we think that the allocation of attorney's fees in such a suit must conform to the purposes and policies of the Act.

The 1972 amendments described above were enacted as a compromise between shipowners and stevedore-employers in order to provide increased statutory compensation payments. For years the scale of compensation payments had been insufficient. Elimination of the unseaworthiness cause of action against the shipowner, and the indemnity action against the stevedore was necessary to ensure adequate funds for the increased benefits. In particular, the drain on the employer's resources by the attorney's fees and expenses required to litigate the third party indemnity actions was cited as an obstacle to funding adequate compensation payments. H.Rep. No. 92-1441, 92d Cong. 2d Sess. in 3 U.S. Code Cong. & Ad. News 4668, 4702 (1972). S. Rep. No. 92-1125, 92d Cong., 2d Sess. 9 (1972) We conclude that the overriding purpose of the 1972 amendments was to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of the increased benefits under the Act.

An award of attorney's fees out of that portion of a third party tort settlement which goes to reimburse the employer or its carrier would contravene this fundamental purpose. It would cause a reduction in the amounts which the employer can legitimately call upon to fund its obligation towards injured workmen under the Act. As Congress was aware of the then unanimous judicial rule that the reimbursement portion of a longshoreman's recovery ordinarily is not reduced by attorney's fees, *see* S. Rep. No. 428, 86th Cong., 1st Sess. in 2 U.S. Code & Ad News 2134, 2135 (1959), a change in this rule which would conflict with the purposes

of its enactments should come from that body.[8] We conclude, in accordance with the intent of Congress, that reimbursement funds undiminished by attorney's fees, should be available to fund the compensation of workmen whose injuries cannot be charged to the tortious conduct of third parties.

Finally, we are not convinced that the longshoreman and his attorney are unfairly treated by this system of distribution. True, the attorney is forced to forego part of his fee which he would receive in an ordinary suit. His client, however, is in an advantageous position in comparison with ordinary tort plaintiffs. Because the longshoreman is guaranteed an absolute minimum in compensation and medical benefits, the attorney should be in a tactically superior position to negotiate a favorable settlement. Since the attorney's fee for this type of litigation is a percentage of the recovery, a larger settlement will result in a larger fee.

The decision of the District Court is affirmed.

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[8] Congress has specifically provided for payment of employee's attorney's fees in administrative proceedings under the Act. If the employer contests the fact of, or the extent of, liability and the longshoreman ultimately prevails, the employer must pay the employee's attorney reasonable fees. 33 U.S.C. § 928(a) & (b).

BLEED THROUGH

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75 - 1210.

PAUL A. CELLA ET AL.,
PLAINTIFFS, APPELLANTS,

v.

PARTENREEDEREI MS RAVENNA,
DEFENDANT, APPELLEE.

JUDGMENT

Entered December 29, 1975

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

/s/ DANA H. GALLUP,
Clerk.

Appendix C.

Dist. 101, Office 1, Type CA, Year 73, Docket number 0086, Filing Date 1-9-73, J-3, N/S 34, O-1, R, Demand other $500, Judge No. 0110

Docket Number 0086-C, Year 73

PAUL A. CELLA AND BARBARA A. CELLA

PLAINTIFFS

Attorneys:

MICHAEL B. LATTI, ESQ.,
KAPLAN, LATTI AND FLANNERY,
89 State Street,
Boston, Massachusetts 02109.
742-2341

PARTENREEDEREI MS RAVENNA

DEFENDANTS

Attorneys:

THOMAS H. WALSH, JR., ESQ.,
BERTRAM E. SNYDER, ESQ.,
BINGHAM, DANA & GOULD,
100 Federal St.,
Boston, Massachusetts 02110.
357-9300

34 Tort Maritime Admiralty Negligence Personal Injury

Docket Entries.

1973		
Jan.	9	Complaint filed.
	9	Summons issued.
Feb.	15	Deft.'s answer filed. c/s
	15	Deft.'s request for production of documents filed. c/s

BLEED THROUGH

15 Deft.'s motion for physical examination of pltff. filed. c/s

15 Deft.'s notice of taking deposition of Custodian of Records of MGH on Mar. 30, 1973 at 2:30 P.M. filed. c/s

15 Deft.'s notice of taking deposition of Paul A. Cella on April 11, 1973 at 10:00 A.M. filed. c/s

16 Deft.'s interrogs. to the pltff. filed. c/s

26 Pltff.'s interrogs. to the deft. filed. c/s

Mar. 12 CAFFREY, CH. J. Deft.'s motion for physical examination of pltff. allowed. Counsel notified.

27 Deft.'s motion to extend to answer interrogs. to April 26, 1973 filed. Assented to.

May 13 Deft.'s answers to interrogs. of the pltff. filed.

24 Plaintiff's Motion to Strike and for further answers, filed.

24 Notice of Taking of Deposition of Charles Moore on June 13, 1973, filed.

June 4 Defendant's Memorandum in Support of its motion in opposition to Pltfs Motion to Strike and for Further Answers, filed.

4 Deft. opposition to pltfs motion to strike and for further answers to Interrogatories, filed.

13 Deft.'s notice of taking deposition of Vencent Hayes, 84 Cedar St., Walt. Mass. on Aug. 2, 1973 at 2:00 P.M. filed. c/s

15 Deft.'s request for production of documents filed. c/s

Jul 17 Case referred to Magistrate for hearing on Pltff.'s motion to strike.

23 Pltffs.'s notice of taking deposition of Bernard O'Donnell on July 27, at 10:00 A.M. filed. c/s

Aug. 8 DAVIS, M. MEMORANDUM on Motion to strike and for further answers issued allowing the motion with respect to Int. 17 and denying with respect to Ints. 9 and 12.

10 Copies of Memorandum sent to counsel; case returned to Clerk's Office.

30 Deft.'s further answers to interrogs. of pltff. filed. c/s

31 Further interrogs. of the pltff. to the deft. filed. c/s

Sept. 4 Pltff.'s notice of taking deposition of the captain of SS Star Ravenna on Oct. 4, 1973 at 1:00 P.M. filed. c/s

4 Pltff.'s request for production of documents filed. c/s

Oct. 2 Deft.'s motion to extend time within which to answer further interrogs. pltff. to Nov. 1, 1973 filed. Assented to.

2 Deft.'s notice of taking deposition of Pat O'Halloran of 18 Elm St., Charlestown, Mass. on Nov. 2, 1973 at 1:00 P.M. filed. c/s

2 Deft.'s notice of taking deposition of Edward Ashman of 293 Brandywine, East Boston, Mass. on Nov. 2, 1973 at 3:00 P.M. filed. c/s

15 Further answers to interrogs. of the pltff. to the deft. filed. c/s

Dec. 4 Deft.'s notice of taking deposition of James Haddleston, M. D. on Jan. 1974, at 2:00 P.M. filed. c/s

Dec. 18 Notice of delinquency issued against the pltff. for failure to answer interrogs. filed on Feb. 16, 1973. Copies to counsel.

BLEED THROUGH

1974

Jan. 2 Pltff.'s motion for extension of time within which to answer deft.'s interrogs. to Jan. 22, 1974 filed. Assented to.

3 Amended further answers to interrogs. of the pltff. to the deft. corp. filed. c/s

15 Pltff.'s motion for extension of time within which to answer deft.'s interrogs. to Feb. 22, 1974 filed. Assented to.

15 Deft.'s notice of taking deposition of Edward Ashman of 293 Brandywine Road, East Boston, Mass. on Feb. 12, 1974 at 2:00 P.M. filed. c/s

23 Pltff.'s motion to amend complaint and add party pltff. filed. Assented to.

28 CAFFREY, CH. J. Pltff.'s motion to amend complaint and add party pltff. allowed. Counsel notified.

Feb. 15 Deft.'s motion for order to show cause filed. c/s

21 Pltff.'s motion for extension of time within which to answer deft.'s interrogs. to March 22, 1974 filed. Assented to.

Mar. 22 Pltff.'s answers to deft's. interrogs filed. c/s

22 Pltff.'s notice of taking deposition of Siegfried Gallien, 2154 Hove 22, Hamburg, Germany on May 10, 1974 at 2:00 P.M. filed. c/s

22 Pltff.'s notice of taking deposition of the officer and/or crew member who defendant intends to produce as a witness at the time of trial on May 1974 at 3:00 P.M. filed. c/s

28 Deft.'s notice of taking deposition of Hugh Langan on April 9, 1974 at 2:30 P.M. filed. c/s

28 Deft.'s notice of taking deposition of Walter Knowlton on April 8, 1974 at 2:00 P.M. filed. c/s

28 Deft.'s notice of taking deposition of Custodian of Records, Lawrence Memorial Hospital on Apr. 9, 1974 at 3:30 P.M. filed. c/s

28 Deft.'s notice of taking deposition of Daniel Sokol, M.D. on April 9, 1974 at 9:30 A.M. filed. c/s

28 Deft.'s notice of taking deposition of Lewis I. Bashaw on April 9, 1974 at 1:00 P.M. filed. c/s

29 Deft.'s motion for rehabilitation examination of pltff. filed. c/s

29 Deft's motion of taking deposition of Custodian Of Records, Grover's Pharmacy, Inc. on Apr. 9, 1974 at 10:30 A.M. filed. c/s

29 Deft.'s notice of taking deposition of the Person in Charge of Records, Bureau of Labor Employees Compensation, 125 Lincoln, St., Boston, Mass. on April 10, 1974 filed. c/s

29 Case referred to Magistrate Princi for hearing on motion for order to show cause.

Apr. 1 Deft.'s notice of taking deposition of David Langan, John T. Clark and Son of Boston, Inc. on April 9, 1974 at 2:30 P.M. filed. c/s

2 Deft.'s notice of deposition of Mr. Van Dissel on Apr. 11, 1974 filed. c/s

3 Pltff.'s opposition to deft.'s motion for rehabilitation examination of pltff filed.

4 PRINCI, M. MEMORANDUM on deft.'s motion for order to show cause submitted.

8 Motion of deft. for trial date certain filed. c/s

*9 Defendant's Motion for a Physical Examination, filed.

9 Notice of Taking of deposition of Barbara Cella, filed.

9 Withdrawal of motion for order to show cause filed.

BLEED THROUGH

10 Defendant's Amended answer to Plaintiff's amended complaint, filed.

10 Memorandum in support of defendant's motion for rehabilitation Examination of the Plaintiff, filed.

10 Defendant's Motion for Physical examination of Plaintiff, filed.

10 Defendant's Motion for Physical examination of Plaintiff, filed.

10 Plaintiff's Notice of Opposition to Defendant's Motion for Physical Examination of Plaintiff, filed.

12 Deft.'s notice of taking deposition of Dr. Timothy Guiney on Apr. 17, 1974 at 5:00 P.M. filed. c/s

15 Pltff.'s notice of opposition to deft.'s motion for physical examination of pltff. filed. c/s (by an internist)

15 Pltff.'s notice of opposition to deft.'s motion for physical examination of pltff. (by a psychiatrist) filed.

16 Deft.'s notice of taking deposition of Dr. Daniel M. Weiss on April 19, 1974 at 4:00 P.M. filed. c/s

19 Deft.'s notice of taking deposition of Paul Cella on Apr. 26, 1974 at 10:00 filed. c/s

19 Deft.'s motion for speedy hearing on pending discovery motion filed. c/s

19 CAFFREY, CH. J. Motion for rehabilitation examination of pltff. allowed; Deft.'s motion for physical examination of pltff. allowed; (psychiatrist) Deft.'s motion for physical examination of pltff. allowed. Counsel notified (By Dr. Halpern)

23 Pltff.'s motion to strike and for further answers filed. c/s

25 CAFFREY, CH. J. Pltff.'s motion to strike and for further answers allowed. Counsel notified.

June 4 CAFFREY, CH. J. Hearing in chambers on deft.'s motion for continuance; motion for continuance allowed; trial date set for Sept. 9, 1974.

12 Deft.'s further answer to pltff.'s interrogs. filed. c/s

13 CAFFREY, CH. J. Motion for continuance of trial date to a date after Sept. 9, 1974. Counsel notified.

Jul 15 Deft.'s further interrogs. to pltff. Paul A. Cella filed. c/s

18 Deft.'s motion for order compelling discovery filed. c/s

22 Pltffs.' opposition to deft.'s motion for order compelling discovery filed. c/s.

Aug. 15 Case referred to Magistrate Davis for hearing on deft.'s motion for order compelling discovery.

28 Deft.'s amended answers to the further interrogs. of the pltff. filed. c/s

28 Deft.'s amended answers to interrogs. of the pltff. filed. c/s

Oct. 10 Agreement for judgment filed .... for the pltffs. in the sum of $1.00, without interest and without costs.

16 Deft's motion that co-pltff. Barbara Cella be appointed guardian of Paul A. Cella for the purpose of effecting the settlement of the above captioned litigation filed. Assented to.

BLEED THROUGH

Oct. 25 CAFFREY, CJ. J. Motion of the deft. to appoint Barbara Cella guardian of Paul A. Cella allowed.

Nov. 20 Motion for leave of Court to deposit disputed sum in court filed. Assented.

Dec. 12 CAFFREY, CH. J. Motion for leave of court to deposit disputed sum in Court allowed. Counsel notified.

1975

Jan. 16 Pltff.'s motion for an order of the Court assessing Attorney's fees and for distribution of funds deposited in Court filed. c/s

16 Memorandum in support of a motion for an order of the Court assessing attys. fees and for distribution of funds deposited in Court filed.

Feb. 10 Motion for leave of Court to deposit disputed sum in Court filed. Assented to.

14 Stipulation to extend time for filing Brief and Affidavits in opposition to Pltf's motion for an order of the court assessing atty's fees and distribution of funds deposited in court, filed. c/s

14 Opposition of American Mutual Ins. Co. to Pltf's motion for an Order of the Court assessing atty's fees and for distribution of funds deposited in Court filed. c/s

19 CAFFREY, CH. J. Motion for leave of Court to deposit disputed sum in court allowed. Counsel notified.

Mar. 3 Brief of American Mutual Insurance Co. in opposition to pltff. attys.' motion for an order of the Court assessing attys.' fees and for distribution of funds in Court filed.

May 5 CAFFREY, CH. J. MEMORANDUM ENTERED . . . . re pltff.'s motion for an order of the Court assessing atty.'s fees and for distribution of a fund deposited in Court. Pltff.'s motion is denied and an order will be entered directing the Clerk to turn over the fund to the American Mutual Insurance Co. Copies to counsel.

6 CAFFREY, CH. J. ORDER ENTERED. In accordance with the memorandum entered on May 5, 1975, it is: Ordered that the Clerk turn over to the American Mutual Insurance Co. the fund of $10,000.00 which has been deposited with the Registry of this Court. Copies to counsel.

14 Receipt of American Mutual Insurance Co. in the amount of $10,175.34 filed by Atty. John Donovan, Counsel in behalf of said Insurance Co.

May 23 Plntff's Notice of Appeal, filed.

23 Cost bond in amount of $250, filed with Notice of Appeal.

June 11 Certified copy of docket entries and original pleadings forwarded to Court of Appeals.

1976

Jan. 15 Opinion received from the Court of Appeals entered . . . . Affirmed.

23 Mandate received from the Court of Appeals entered . . . . Affirmed. Original pleadings returned from the Court of Appeals.

BLEED THROUGH

I hereby attest and certify on March 12, 1976, that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

GEORGE F. McGRATH
Clerk, U.S. District Court
District of Massachusetts
By: /s/ David A. Kopech,
Deputy.

Appendix D.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION 73-86-C

PAUL A. CELLA AND
BARBARA CELLA

v.

PARTENREEDEREI MS RAVENNA

ORDER

CAFFREY, CH. J.

In accordance with the memorandum entered on May 5, 1975 it is;

ORDERED that the Clerk turn over to the American Mutual Insurance Company the fund of $10,000.00 which has been deposited with the Registry of this Court.

ANDREW A. CAFFREY,
CH. J., U. S. District Court.
/s/ PETER A. SKARMEAS,
Deputy Clerk.

May 6, 1975

BLEED THROUGH

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 73-86-C

PAUL A. CELLA AND
BARBARA CELLA

v.

PARTENREEDEREI MS RAVENNA

MEMORANDUM

May 5, 1975

CAFFREY, Ch. J.

This matter came before the Court on plaintiff's motion for an order of the Court assessing attorney's fees and for distribution of a fund deposited in Court. By the motion plaintiff seeks an order that an allowance for his counsel be made out of a $10,000 deposit made in the Registry of this Court. The $10,000 is a portion of a total fund of $24,560.72 received by American Mutual Insurance Company as a reimbursement to it for expenditures made under circumstances described hereinafter.

The present controversy is a residual of litigation which arose out of a maritime personal injury sustained by Paul A. Cella on December 12, 1972 while he was employed as a longshoreman by a stevedoring firm, John T. Clark and Son of Boston. The accident occurred while plaintiff was working aboard the SS Star Ravenna, a vessel owned by defendant.

Cella filed a personal injury case in this Court against the owner of the vessel and the records of that case establish that prior to the settlement of the personal injury case, he received $24,560.72 from American Mutual In-

surance Company under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The personal injury case was settled in the amount of $199,560.72, paid to plaintiff by the owner of the vessel on September 30, 1974. From this amount, American Mutual Insurance Company was reimbursed the full $24,560.72.

Because of a claim of attorney's lien against the amount of reimbursement to American Mutual Insurance Company, a bond in the amount of $10,000 was deposited in the Registry of this Court pending a ruling as to whether or not this sum of money claimed by American Mutual Insurance Company is subject to the lien for counsel fees and costs asserted by Michael B. Latti, Esquire, attorney for plaintiff. The sum of $24,560.72 represents the total paid by American Mutual Insurance Company on account of medical payments and compensation to Cella by reason of the injury which he sustained on December 12, 1972.

The sum of $24,560.72 was deducted from the gross amount paid to plaintiff by the owner of the vessel. Mr. Latti then computed the one-third contingent fee on the remainder of the gross settlement left after that deduction, i.e. on $175,000.

33 U.S.C.A. § 933(b) provides in pertinent part that "Acceptance of such compensation . . . shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award." Section 933(e) provides that "Any amount recovered by such employer on account of such assignment . . . shall be distributed as follows:

BLEED THROUGH

(1) The employer shall retain an amount equal to —
(A) the expenses incurred by him in respect to such proceedings . . ."

This language was construed in *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (S.D. N.Y., 1952), *aff'd sub nom Fontana* v. *Grace Line*, 205 F. 2d 151 (2 Cir. 1953), *cert. den. sub nom Fontana* v. *Huron Stevedoring Co.*, 346 U.S. 886 (1953), where the Court observed

> "the Act treats the recovery as a fund charged first with the expense of the litigation and then with the amounts paid for compensation and medical expenses and the employee becomes entitled only to any excess finally remaining. There is no reason why a recovery obtained against the third party by the employee rather than the employer should be distributed differently. The expense of securing the recovery is, as in equity it should be, a first charge against the fund itself . . . . the employer, is therefore entitled to receive out of the $4,000 settlement, its compensation and medical expense payments, without deduction for attorneys' fees or other litigation costs."

106 F. Supp. at 463-464. A similar ruling was made in *Ashcraft and Gerel* v. *Liberty Mutual Insurance Company*, 343 F. 2d 333, 336 (D.C. Cir. 1965), where the Court observed "Certainly where the recovery is large enough to go round, full reimbursement of the employer — in the sense of his being made absolutely whole in respect of liability for compensation payments — is an important object of Congressional policy." Accord, *Davis* v. *United States Lines Co.*, 153 F. Supp. 912, 915 (E.D. Pa. 1957), *aff'd* 253 F. 2d 262 (3 Cir. 1958).

It appears that in one or two cases where the injured working man's recovery against a third party in a District Court action has been inadequate to repay the compensation carrier and pay a normal fee to his lawyer the Court of Appeals for the Fifth Circuit has made an allowance for attorneys' fees prior to permitting recovery by the compensation carrier. *Strachan Shipping Company* v. *Melvin*, 327 F. 2d 83 (5 Cir. 1964); *Chouest* v. *A & P Boat Rentals, Inc.*, 472 F. 2d 1026 (5 Cir. 1973), *cert. den. sub nom Travelers Insurance Co.* v. *Chouest*, 412 U.S. 949 (1973).

However, speaking for the Court of Appeals for the Fifth Circuit in *Chouest, supra*, Judge John Minor Wisdom observed that these cases were the exceptional cases and stated that

> "Reallocation need be undertaken only in very limited circumstances . . . reallocation is likewise mandated where the intervenor's attorney contributes nothing of material assistance to the plaintiff's case, and instead devotes his efforts to undermining it . . . the question of reallocation will never even arise in the majority of cases, where the amount of recovery is sufficient both to reimburse the intervenor and pay the plaintiff's attorney." (472 F. 2d at 1037.)

Accordingly, plaintiff's motion is denied and an order will be entered directing the clerk to turn over the fund to the American Mutual Insurance Company.

ANDREW A. CAFFREY.

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Appendix E.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. §§ 901 ET SEQ.

§ 905. Exclusiveness of liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the

vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.
As amended Oct. 27, 1972, Pub. L. 92-576, § 18(a), 86 Stat. 1263.

§ 933. Compensation for injuries where third persons are liable

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

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(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

(f) If the person entitled to compensation institutes proceedings within the period prescribed in subdivision

(b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer.

Mar. 4, 1927, c. 509, § 33, 44 Stat. 1440; June 25, 1938, c. 685, §§ 12, 13, 52 Stat. 1168; Aug. 18, 1959, Pub L. 86-171, 73 Stat. 391.

SUPREME COURT, U. S.

FILED

APR 29 1976

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-1361.

PAUL CELLA ET UX.,
PETITIONERS,

v.

PARTENREEDEREI MS RAVENNA ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Memorandum in Opposition to Petition for Writ of Certiorari.

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Memorandum Opposing Certiorari.

The respondent American Mutual Insurance Company, hereinafter called "American," opposes petitioners' petition for writ of certiorari from the decision of the First Circuit Court of Appeals in this matter made on December 29, 1975. By

implication petitioners maintain that, had American formally intervened in the personal action brought by the petitioners, no claim could be made by petitioners for an allocation of petitioners' counsel fees from the funds which are used to reimburse the compensation carrier's lien for compensation and medical payments made pursuant to the Longshoremen's and Harbour Workers' Compensation Act, 33 U.S.C. §§ 901 et seq., hereinafter called "Act." See Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit, at 7.

American contends that formal intervention is not necessary to avoid paying a fee to the longshoreman's attorney. *Russo* v. *Flota Mercante Grancolombiana*, 303 F. Supp. 1404 (S.D. N.Y. 1969). However, if formal intervention will protect the compensation carrier from being charged a fee by counsel for the longshoreman, then the question presented by this petition for a writ of certiorari is not so substantial nor of such practical significance as to warrant the Court's consideration since formal intervention could be undertaken by the carrier to avoid the fee.

Respondent agrees that there is a conflict among the circuit court decisions concerning the allocation of the longshoreman counsel's attorney's fee. It was created by the Fourth Circuit decision in *Swift* v. *Bolten*, 517 F. 2d 368 (4th Cir. 1975). Respondent contends, however, that the *Swift* decision, *supra*, not only conflicts with the decision of the First Circuit in this matter but also with the decisions of the other circuits. See, *e.g.*, *Fontana* v. *Grace Line, Inc.*, 205 F. 2d 151 (2d Cir. 1953), cert. denied, 346 U.S. 886 (1953); *Davis* v. *United States Lines Co.*, 253 F. 2d 262 (3d Cir. 1958); and *Ashcraft and Gerel* v. *Liberty Mutual Insurance Co.*, 343 F. 2d 333 (D.C. Cir. 1965). Petitioners contend that the 1972 amendment, P.L. 92-576, § 18, 1972, of § 5 of the Act, which eliminated third party actions against stevedores, requires the

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allowance of attorney's fees against the compensation carrier. However, the *Fontana*, *Davis*, and *Ashcraft* cases, *supra*, did not involve third party defendants and all held against the allowance of attorney's fees.

The *Swift* decision, *supra*, relied on the following two cases which are not applicable to the awarding of attorney's fees to the longshoreman counsel. *Vaughn* v. *Atkinson*, 369 U.S. 527 (1962), reh. denied, 370 U.S. 965 (1962), concerned the defendant's bad faith denial of maintenance and care, and *Sheris* v. *Travelers Insurance Co.*, 491 F. 2d 603 (4th Cir. 1974), involved a state compensation statute which specifically allowed apportionment of attorney's fees between the plaintiff and compensation carrier. The *Swift* decision, *supra*, states that had the compensation carrier brought suit it would have had to pay for its attorney's fees. However, § 933 of the Act specifically allows the compensation carrier which brings suit in the name of the longshoreman to recover its lien as well as legal fees and expenses in connection with the suit. Thus, American believes that it is premature for review by the United States Supreme Court.

Conclusion.

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
THOMAS D. BURNS,
Attorney for Respondent.